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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER AND LIGHT COMPANY,
APPELLANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
APPELLEE.

STATEMENT AS TO JURISDICTION.

Rule 12 (paragraph 1) of this Court requires appellant to file a statement setting forth the basis on which it contends the Court has jurisdiction to review the decree appealed from.

The Court's jurisdiction in this case in invoked under Section 237 (*a*) of the Judicial Code of the United States, 43 Stat. 937 (28 U. S. C., Section 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The writ of error was abolished and appeal substituted therefor by the Act of Congress approved January 31, 1928, 45 Stat. 54 (28 U. S. C., Sec. 861 (*a*)).

Nature of Case and Rulings Below.

Appellant owns the gas-distribution systems in and supplies natural gas to the municipalities of Troy, Piqua, Sidney, Tippecanoe City, North Hampton, South Charleston, and Washington Court House, and in the unincorporated territory of Wilberforce and the territory outside of and adjacent to Troy, all in the State of Ohio. Appellant owns no gas lands or leaseholds and buys its gas supply from the Ohio Fuel Gas Company at wholesale (delivered to it at the several city gateways), under contracts, at the price of 45 cents per M cubic feet.

The Ohio Fuel Gas Company buys from the United Fuel Gas Company, a West Virginia corporation, a large part of the gas it supplies appellant, which gas is produced in West Virginia and transported in interstate commerce.

Prior to June 17, 1929, appellant had on file with the Public Utilities Commission of Ohio and in effect schedules of natural-gas rates in the eight towns which did not yield to it a fair and reasonable return on the value of its property used and useful in furnishing gas service to said towns. On that date (June 17, 1929), appellant filed with said Commission new schedules increasing its rates.

Pursuant to Section 614-20 of the General Code of Ohio, the Commission suspended said new schedules of rates for 120 days from June 17, 1929, and before the expiration of the period of suspension appellant gave bond under the statute to refund to its gas consumers in the eight towns such portion of the increased rates as the Commission or a court might determine to be unreasonable and excessive, if it should be so determined.

Hearings were had and on November 21, 1930, the Commission entered an order directing appellant to produce "all evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of 45 cents, and failing to do this within a reasonable time, the application for the increase of rates will be denied."

Pursuant to said order appellant produced the evidence called for and proved the value of the property of the Ohio Fuel Gas Company and the United Fuel Gas Company used and useful in supplying gas to it, and also said companies' operating expenses. The Commission reduced the property values and operating costs so proved in substantial amounts, and held that 39 cents per M cubic feet was a fair price for the gas purchased by appellant, and that it would only be allowed this amount in its operating expenses, and on November 3, 1932, entered an order striking from its files said new schedules, thereby remitting appellant to the former rates, and ordered it to cease charging the new rates and to refund to its consumers in said eight towns the difference between the old and new rates, with 6 per cent interest per annum from dates of payment, the refunds so ordered amounting to over $300,000.

Appellant duly filed with the Commission an application for rehearing and its protest of said valuations, which application and protest were denied on December 20, 1932.

On December 21, 1932, appellant filed its petition in error in the Supreme Court of Ohio from said findings, rulings, and orders of the Commission; and on June 21, 1933, said court handed down a decision affirming the orders of the Commission. Thereafter, on July 19, 1933, appellant, in accordance with the rules and practice of said court, filed its application for rehearing, which application the court denied on the 20th day of September, 1933, and entered its final judgment affirming said findings and orders of the Commission.

The order of the Public Utilities Commission fixing the rates which may be charged by appellant for the use of its property in furnishing gas service to the public is a statute of the State within the meaning of Section 237 (*a*) of the Judicial Code. *Sultan Ry. Co.* v. *Dept. of Labor*, 277 U. S. 135, 136.

In its petition in error filed in the Supreme Court of Ohio appellant set forth the facts on which it challenged the validity of the order of the Public Utilities Commission as repugnant to the Constitution of the United States, and in its application for rehearing filed in said court appellant assigned numerous rulings and holdings of the Commission and court which confiscated its property, in violation of the Fourteenth Amendment to the Federal Constitution.

Application or petition for appeal to this Court was presented to the Chief Justice of the Supreme Court of Ohio on the 21st day of September, 1933, and allowed by him on that day.

The following cases and decisions of this Court are believed to sustain its jurisdiction of this appeal:

Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287.

State of Mo. ex rel. S. W. Tel. Co. v. *Pub. Serv. Comm.*, 262 U. S. 276.

Bluefield Co. v. *Pub. Serv. Comm.*, 262 U. S. 679.
Ohio Utilities Co. v. *Pub. Serv. Comm.*, 267 U. S. 359.
Nor. Pacific v. *Dept. of Pub. Works*, 268 U. S. 39.
Chi., etc., Ry. v. *Pub. Util. Comm.*, 274 U. S. 344.
United Railways v. *West*, 280 U. S. 234.

Appellant claims that the orders of the Public Utilities Commission of Ohio (in A. U. R. P. No. 341 on its docket) and the judgment of the Supreme Court of Ohio (in case No. 23893 on its docket) affirming said orders confiscates and deprives it of its property without due process of law and denies it the equal protection of the laws, contrary to the provisions of the Constitution of the United States, and particularly violates the Fourteenth Amendment and Section 10 of Article 1 thereof.

It is respectfully submitted that this Court has jurisdiction of this appeal by virtue of the Acts of Congress above cited.

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Dated, September 21, 1933.